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Nos. 938 and 939

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

PEABODY COAL COMPANY, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

UNITED MINE WORKERS OF AMERICA, ET AL., *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' REPLY BRIEF TO OPPOSITION BRIEF OF NATIONAL LABOR RELATIONS BOARD

AND

RENEWAL OF MOTIONS TO DEFER CONSIDERATION OF PETITIONS

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PETITIONERS' (CAUSES NOS. 938 AND 939) REPLY BRIEF TO OPPOSITION BRIEF OF NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

I. RENEWAL OF MOTIONS TO DEFER CONSIDERATION OF PETITIONS

In Petitions for Writs of Certiorari (Causes Nos. 938, 939), each containing a "Motion to Defer Consideration of Petition" (Cause No. 938, p. 11; Cause

No. 939, p. 41), Petitioners[1] recited that National Labor Relations Board[2] had filed with the Seventh Circuit a petition for clarification or modification and amendment of its opinion of December 2, 1960, relating to that Court's having set aside Board's order concerning Peabody Coal Company's obligation to bargain with Progressive Mine Workers. In its opposition brief[3] filed with this Court in the instant causes, Board states (p. 11), that "the matter is still pending". However, on May 25, 1961, the Seventh Circuit issued its opinion, declining to modify its opinion or mandate but reciting its reasons for not requiring Peabody to bargain with Progressive Mine Workers. The Seventh Circuit's opinion appears as Appendix A hereto. Its order denying the petition appears as Appendix B hereto.

In the deferment motions, petitioners urged that should Board seek review of the Seventh Circuit's decree of April 5, 1961 (Petition, No. 939, App. 14a) which provides, *inter alia*, Peabody need not bargain with Progressive, consideration of the petitions conjointly with that of Board would serve to present a clearer and more complete picture of the various issues presented in the case before the Seventh Circuit than a consideration of each petition separately.

[1] The term "Petitioners" herein refers to Peabody Coal Company, Petitioner in Cause No. 938, and United Mine Workers of America; District 12, United Mine Workers of America; Local Union 1227, United Mine Workers of America; and Local Union 1229, United Mine Workers of America, Petitioners in Cause No. 939.

[2] Herein, National Labor Relations Board will be called "Board".

[3] The abbreviation "O.B." refers to Board's opposition brief.

Petitioners' positions are emphasized in the light of the Seventh Circuit's May 25, 1961 opinion. Therein, though it declares, "we do not hold the UMW is now the authorized representative of the employees at the two mines" explains that under the case's circumstances, a Board election is the appropriate method to determine the employees' choice, and holds that it is "an entirely futile act to now require Peabody to bargain with a union which has not represented its employees for three and one-half years", it is most pertinent that the Court declares that

> "*In 1957, the employees at both mines involved in this case clearly indicated their choice of UMW as their representative*" (App. 2a).

While Board (O.B. 11, fn. 9) indicates its acceptance of the Seventh Circuit's adverse holdings against it as to the union-security clause, dues reimbursements and reimbursement to Progressive's welfare fund, it does not foreclose its seeking certiorari on the bargaining issue (*Ibid*, p. 11, fn. 9 and 10),[4] which stresses the necessity of petitioners' renewing their respective motions that the Court defer consideration of the instant petitions until Board attitude on the bargaining issue is clarified.

For the foregoing reasons, and those assigned by petitioners in their respective petitions, petitioners now renew said motions.

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[4] See footnote 5 herein.

II. PETITIONERS' REPLY TO BOARD'S OPPOSITION BRIEF

No attempt will be made to reply, *seriatim*, to Board's brief in opposition to the granting of writs of certiorari herein. Petitioners submit that answers thereto are contained in their respective petitions. In addition, the Court's attention is directed to the following particular matters appearing in the opposition brief.

It is a cogent fact that, although petitioners (Petition, No. 939, pp. 24 *et seq.*) charge that Board's findings and conclusions were reached by ignoring vital and undisputed evidence clearly challenging Board's views, *there is no denial of this charge in Board's opposition brief.* Though Board, alluding to the Unions' letter of July 1, 1957, to the employees, attempts to justify Board's finding of coercive impact when "viewed in the context of the total pattern of events" (O.B. 14), the vice of Board's opposition brief, like its decision, is that that is precisely what Board failed to do in arriving at its findings and conclusions and, importantly it has never denied the charge of its failure —either in the Seventh Circuit or in this Court. Petitioners' complaint of the Seventh Circuit's findings is based upon its failure to implement the congressional standard recognized by this Court's *Universal Camera Corporation* v. *NLRB*, 340 U.S. 474. It is noteworthy that in attempting to justify the Board's findings, Board asserts "the evidence detailed in the statement demonstrates that there is ample support in the record for the Board's unfair labor practice findings" (O.B. 12); but the Board fails, as this Court stated in the *Universal Camera* case, to implement the principle that "*substantiality of evidence must take into account*

whatever in the record fairly detracts from" the weight of Board's findings.

Though the Seventh Circuit made clear that no employee was actually coerced into paying dues to UMW, that membership in UMW was not a condition of employment, and that no employee lost his job in the change-over to UMW, Board asserts that petitioners are not aided by those findings (O.B. 14). *Local 60, Carpenters* v. *NLRB*, No. 68, this term, decided April 17, 1961, cited by Board (O.B. 14), affords Board no support, since Board fails to point out the Seventh Circuit's findings included also that "no employee of either of the coal mines . . . complained of any coercion or discriminatory conduct" (Petition, No. 939, App. 2a), that "no employee claims his rights under Section 7 were violated" (*Ibid*, 7a), and that "there are no findings of actual coercion in the instant case nor any evidence which would have supported such findings" (*Ibid*, 10a). There is a lack of accuracy in Board's statement (O.B. 10) that "The court of appeals upheld the Board's unfair labor practice findings as supported by substantial evidence." First, the lack of "substantial evidence" has been noted both herein and in the petition (Cause No. 938). Secondly, clearly there is no consonancy between the Board's findings of employee coercion and interference (R. 54-7) and the Seventh Circuit's repeated recitals above quoted that employees were not coerced or discriminated against. In the light of these Seventh Circuit's findings, Board's opposition brief affords no support for its position that "UMW's subsequent majority was not freely acquired but tainted by the unfair labor practices" (O.B. 13). In its denial of Board's bargaining order, the Seventh Circuit accented that

"employees . . . *clearly* indicated their choice of United Mine Workers of America as their representative" (App. 2a), which is one of the vital facts ignored.

Board asserts (O.B. 10) its order required petitioners to desist from the unfair labor practices found. This is not accurate. Upon Unions' complaint that Board's order was too broad, the Seventh Circuit agreed and held that the order should be limited to the employees of the two mines involved; that the words "or any other employer" should be deleted; and that the order "should be limited to UMW's and Peabody's actual unfair labor practices in this case" (Petition, No. 939, App. 11a). Unions complained in their petition (Cause No. 939) that the Seventh Circuit's decree that Unions cease restraining and coercing employees was totally at variance with its findings of no coercion, and that Board, its Examiner and the Seventh Circuit alike failed to give consideration to that "body of evidence opposed to the Board's view", contrary to the *Universal Camera* case.[5] Board's opposition brief does not challenge this contention.

Similarly, Peabody, in its petition (Cause No. 938, p. 6, *et seq.*), complained the Seventh Circuit's order was too broad. Its reasons appear therein. Board's opposition brief fails to supply an adequate answer

[5] In Board's opposition brief (p. 11, fn. 9), Board asserts the Seventh Circuit's holdings on the alleged closed shop and dues reimbursement issues are consistent with recent cases of this Court, and that Board has decided not to contest the Seventh Circuit's action in denying enforcement of its order requiring payments to the Progressive Welfare Fund and in deleting the "or any other employer" clause. Obviously, Board is telling this Court that it disagrees with the Seventh Circuit's holdings that the order should be limited to the employees of the two mines involved and to Unions' and Peabody's actual unfair labor practices in this case and that its intention is to seek certiorari on such holdings.

thereto, and it makes no attempt to respond to Peabody's charge that there should be settled the question with respect to an employer's furnishing a list of employees to one of two contending unions.

CONCLUSION

Petitioner (in Cause No. 938) and Petitioners, and each of them (in Cause No. 939), pray that the respective petitions for writs of certiorari filed by each should be granted as prayed for in their respective petitions, for the reasons assigned in such petitions and herein, and that this Honorable Court defer consideration of said petitions for certiorari, pursuant to motions in said petitions, renewed herein.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

September Term 1960 — April Session 1961

No. 12889

PERRY COAL COMPANY and PEABODY COAL COMPANY, et al., *Petitioners*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

No. 12915

UNITED MINE WORKERS OF AMERICA, et al., *Petitioners*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

UPON BOARD'S PETITION FOR MODIFICATION OR CLARIFICATION

May 25, 1961

Before DUFFY and SCHNACKENBERG, Circuit Judges, and MERCER, District Judge.

DUFFY, *Circuit Judge*. The National Labor Relations Board has petitioned for a modification of our opinion in *Perry Coal Company* v. *NLRB*, 284 F. 2d 910, or in the alternative, for a clarification of the ground upon which this Court relied for holding that Peabody need not bargain with any union until after a Board election.

We decline to modify the opinion or the mandate herein. However, we think it proper to state our reasons for not requiring Peabody to bargain with Progressive Mine Workers.

The Board found that the Company violated section 8(a)(5) of the Act by refusing to bargain with Progressive.

To remedy this unfair labor practice, the Board ordered the Company to resume bargaining with Progressive. The Board argues that the Supreme Court has made it clear that where a bargaining relationship has been unlawfully disrupted or frustrated, the appropriate remedy is to require the employer to bargain, and give the relationship a fair opportunity to become established. In support of their contention, the Board cites *NLRB* v. *P. Lorillard Co.*, 314 U.S. 512, and *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702.

It is clear from the two cases just cited, the Board may adopt such a remedy in an appropriate case. However, the power of the Board to fashion remedies is not limitless. The Board may not apply "a remedy it has worked out on the basis of its experience, without regard to circumstances which may make its application to a particular situation oppressive and therefore not calculated to effectuate a policy of the Act." *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 349.

We examine the Board's order to resume bargaining with Progressive in the light of the undisputed facts and circumstances of this case. The contract of Progressive terminated by its terms in September, 1957. Progressive has not represented the employees here involved for more than three and a half years. In 1957, the employees at both mines involved in this case clearly indicated their choice of United Mine Workers as their representative. It seems to us to be an entirely futile act to now require Peabody to bargain with a union which has not represented its employees for three and a half years.

We wish to make it clear that we do not hold the United Mine Workers is now the authorized representative of the employees at the two mines. We do hold, however, that under the circumstances of this case, a Board election is the appropriate method to determine the choice of the employees. It seems reasonable that this determination should be made as quickly as possible so that normal labor

relations can be restored at the two mines involved. We cannot understand, under the circumstances of this case, why the Board insists on Peabody bargaining with Progressive when there is no evidence in this record to show that organization would be the employees' choice since the time Peabody assumed control or ownership of the O'Fallon and Millstadt mines.

To insist that Peabody now bargain with Progressive would be like jousting with windmills. Any realistic appraisal of the situation in this case indicates that such a course would be entirely futile, and would, in all likelihood, have no result other than to arouse bitterness and antagonisms.

We think the situation here is similar to that which faced the Court in *NLRB* v. *Marcus Trucking Co.*, 2 Cir., 286 F. 2d 583. There, the Board found the employer had violated section 8(a)(5) of the Act by recognizing a second union during a period when the employer was bound by the "contract bar" rule from recognizing any other union. The Board ordered the employer to cease from recognizing the second union unless and until it was certified by the Board and to recognize and bargain with the original union in the meanwhile. The Court modified the Board's order and conditioned enforcement upon the Board's holding an election within sixty days after the Court's order became final. The Court said cases like *Franks Bros.* do not prescribe an iron-clad rule and held:

> "Although we affirm the Board's holding of an unfair labor practice, this was surely at the periphery and not the center of § 8(a); the interest being vindicated here is not so much the direct interest of the employees in freely choosing their bargaining representatives as the broader interest in industrial peace. We fail to see how that would be promoted by forcing respondent to recognize a union whose claim to contract bar protection expired more than eighteen

months ago, which ceased to represent the employees over a year before that, and which may not be their choice today, when an election can so easily tell." (at page 594)

For these reasons we adhere to our holding that Peabody need not bargain with any union until after a board-conducted election.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Thursday, May 25, 1961

Before

Hon. F. Ryan Duffy, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Frederick O. Mercer, District Judge

No. 12889

PEABODY COAL COMPANY and PEABODY COAL COMPANY, et al., *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

No. 12915

UNITED MINE WORKERS OF AMERICA, et al., *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

This matter comes before the Court upon the petition of the National Labor Relations Board for clarification or modification of the opinion of this Court heretofore filed on December 2, 1960.

On consideration whereof, It Is Hereby Ordered by the Court that the said petition for clarification or modification be, and the same is hereby, Denied, in accordance with the opinion of this Court filed this day.

A True Copy:

Teste:

KENNETH J. CARRICK
Clerk of the United States Court of Appeals for the Seventh Circuit.